IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-617

SIERRA CLUB, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Sierra Club, the Metropolitan Washington Coalition for Clean Air, New Mexico Citizens for Clean Air and Water, the Oregon Environmental Council, Susan L. Moore, Sally Rodgers, Stephen Winter, and John Tanton pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.[1]

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[1] The Sierra Club filed a petition for review in No. 74-2063 below and, joined by the Metropolitan Washington Coalition for Clean Air and the New Mexico Citizens for Clean Air and Water, petitioned for review in No. 74-2079 below. The Oregon Environmental Council, Susan L. Moore, Sally Rodgers, Stephen Winter, and John Tanton joined the Sierra Club as intervenors in the various cases in the court below which were consolidated.

OPINION BELOW

The opinion of the court of appeals has not yet been officially reported. It is set out as Appendix A to the Petition for a Writ of Certiorari in No. 76-529 which was filed by the Montana Power Company and fourteen other petitioners seeking to review the same judgment of the court below.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1976. Petition, No. 76-529, App. C. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the regulations promulgated by the Environmental Protection Agency to prevent significant deterioration of existing clean air fail to carry out the requirements of the Clean Air Act by:

(1) allowing the deterioration of existing clean air in areas designated as Class III all the way to the national ambient air quality standards; and

(2) failing to adopt any provisions to prevent deterioration of existing clean air by nitrogen oxides, hydrocarbons, carbon monoxide, and photochemical oxidants, which are pollutants covered by the Act.

STATUTE AND REGULATIONS INVOLVED

The regulations adopted by the Environmental Protection Agency are found in 40 C.F.R. 52.01(d), (f), and 52.21. The regulations were published in 39 Fed. Reg. 42510, and amended in 40 Fed. Reg. 2802, 40 Fed. Reg. 25004, and 40 Fed. Reg. 42011. The text of the regulations is set out in the Petition, No. 76-529, App. B, pp. 75a-90a.

[1] Hereafter the appendices to the petition in No. 76-529 are designated as Petition, No. 76-529, App. ——.

The Clean Air Act, as amended, 42 U.S.C. 1857, *et seq.*, is set out in the Petition, No. 76-529, App. E.

STATEMENT

Congress provided in Section 109 of the Clean Air Act, 42 U.S.C. 1857c-4, that the Administrator of the Environmental Protection Agency should establish ambient air quality standards which would apply throughout the country. The primary ambient air standards were required to be set at levels of pollution "requisite to protect the public health." 42 U.S.C. 1857c-4(b)(1). Secondary standards were required to be set at levels of pollution "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." 42 U.S.C. 1857c-4(b)(2). The public welfare was defined broadly as any "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." 42 U.S.C. 1857h(h). Pursuant to this authority, the Administrator adopted National Primary and Secondary Ambient Air Quality Standards for the six air pollutants which had been determined, under Section 108, 42 U.S.C. 1857c-3, to have "an adverse effect on public health and welfare" and the "presence of which in the ambient air results from numerous or diverse mobile or stationary sources * * *." The six pollutants are sulfur dioxide, particulates, carbon monoxide, hydrocarbons, nitrogen dioxide, and photochemical oxidants. 40 C.F.R. 50.40.11.

Section 110 of the Clean Air Act requires each State to adopt an implementation plan to carry out the pro-

visions of the Act. 42 U.S.C. 1857c-5. The plans may include emission limitations for various kinds of pollution sources, permit systems for new sources, land-use controls, transportation controls, inspection systems for automobiles, and systems for monitoring air quality. 42 U.S.C. 1857c-5(a)(2).

The States were required to submit their implementation plans to the Administrator by January 31, 1972. 42 U.S.C. 1857c-5(a)(1). The Administrator was required, by May 31, 1972, to determine whether the plans complied with the Act and, on this basis, to approve or disapprove them. 42 U.S.C. 1857c-5(a)(2). If the Administrator disapproved a state plan or any portion of it, he was required within two months to promulgate his own regulations to replace the disapproved portion. 42 U.S.C. 1857c-5(c).

Section 101 of the Clean Air Act, 42 U.S.C. 1857(b)(1), provides that "[t]he purposes of this subchapter are—(1) to protect and enhance the quality of the Nation's air resources * * *." Accordingly, the Administrator adopted, as part of the national standards, 40 C.F.R. 50.2(c), which is still in effect:

> The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State.

In spite of this provision, however, the Administrator also adopted, as part of the regulations to guide the formulation and content of state implementation plans, 40 C.F.R. 51.12(b), which stated:

> In any region where measured or estimated ambient levels of a pollutant are below the levels specified by an applicable secondary standard the state implementation plan shall set forth a control strategy which shall be adequate to prevent such ambient pollution levels from exceeding such secondary standard.

Subsequently, the Administrator made clear that he would approve state implementation plans which permit the degradation of existing air quality as long as the pollution levels did not exceed those permitted by the secondary standards.

Petitioners Sierra Club, the Metropolitan Washington Coalition for Clean Air, and the New Mexico Citizens for Clean Air and Water filed suit in May 1972 in the District Court for the District of Columbia to challenge the legality of EPA's determination to allow air quality to deteriorate to the national standards. The district court carefully considered the language of the Clean Air Act, its legislative history, and administrative history. On the basis of this analysis, the court concluded that (*Sierra Club* v. *Ruckelshaus*, 344 F.Supp. 253, 256 (1972)):

> * * * the Clean Air Act of 1970 is based in important part on a policy of non-degradation of existing clean air and that 40 C.F.R. § 51.12(b), in permitting the states to submit plans which allow pollution levels of clean air to rise to the secondary standard level of pollution, is contrary to the legislative policy of the Act and is, therefore, invalid.

In accordance with this judgment, the court enjoined the Administrator from:[1]

> approving any state implementation plan under 42 U.S.C. 1857c-5 unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator. * * * The Administrator shall * * * approve any portion of a state plan which effectively

[1] The order of the district court is set forth in the Appendix to this petition.

prevents the significant deterioration of existing air quality in any portion of any state, and disapprove any portion of a state plan which fails to effectively prevent the significant deterioration of existing air quality in any portion of any state.

The Administrator shall prepare and publish proposed regulations, pursuant to 42 U.S.C. 1857c-5(c) as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration.

On November 1, 1972, the Court of Appeals for the District of Columbia Circuit affirmed per curiam on the basis of the district court's opinion. 4 ERC 1815. On June 11, 1973, this Court affirmed by an equally divided Court. *Fri* v. *Sierra Club*, 412 U.S. 541.

The final regulations were signed by the Administrator on November 27, 1974. 39 Fed. Reg. 42510. The regulations establish a structure through which those areas of the country which enjoy air with lower levels of sulfur dioxide or particulate pollution than is permitted by the national standards are to be designated Class I, Class II, or Class III. 40 C.F.R. 52.21(c)(1), (2). Any area which is designated Class I would be permitted to increase pollution of sulfur dioxide or particulates by the smallest increment. 40 C.F.R. 52.21(c)(2)(i). A Class II area would be allowed a very substantially larger pollution increment. *Ibid.* A Class III area would be permitted to increase pollution from whatever level previously existed up to the level of the national standards. 40 C.F.R. 52.21(c)(2)(ii). Authority to redesignate areas as Classes I or III is given to the State or to the appropriate Indian Governing Body where the State has not assumed jurisdiction over Indian lands. 40 C.F.R. 52.21(c)(3)(i), (ii), (v). As to Federal

lands, the Federal Land Manager may redesignate such lands to a more restrictive classification than initially applies or than the State has provided. 40 C.F.R. 52.21(c)(3)(iii), (iv).

The regulations did not contain provisions limiting increased pollution of clean air areas from nitrogen oxides, carbon monoxides, hydrocarbons or photochemical oxidants.

Upon issuance of the final regulations, petitions for review were filed in the Court of Appeals for the District of Columbia Circuit, pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 1857h-5(b)(1), and in five other courts of appeals. The latter cases were transferred by those courts to the District of Columbia Circuit and all of the review proceedings were consolidated by that court.

The Sierra Club and related petitioners sought review of the regulations on the ground that they failed to comply with the requirements of the Clean Air Act and of the judicial rulings in *Sierra Club* v. *Ruckelshaus*, *supra*. They primarily alleged that the regulations were invalid insofar as they allowed pollution levels in Class III areas to rise to the national standards, regardless of the existing degree of pollution, and entirely omitted regulated pollutants other than sulfur dioxide and particulates. However, they supported the constitutional and statutory authority of EPA to issue regulations to prevent the significant deterioration of air quality. The petitions filed on behalf of industry in the courts of appeals challenged the regulations in their entirety, arguing that EPA had no constitutional or statutory authority for their issuance and that the procedures by which they were adopted were improper.

The court of appeals essentially rejected all of these arguments. The court concluded (Petition, No. 76-529, App. A, p. 51a):

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration" regulations. Our review of *Sierra Club* v. *Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the non-deterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

REASONS FOR GRANTING THE WRIT

Petitioners here agree with the decision of the court of appeals that the Environmental Protection Agency had the authority and indeed the duty to promulgate regulations to prevent significant deterioration of existing clean air and that the procedures by which the regulations were adopted were proper. We seek a writ of certiorari limited to our contentions that the regulations adopted by EPA do not carry out the requirements of the Clean Air Act and the mandate of the district court, which was affirmed by the court of appeals and this Court in *Sierra Club* v. *Ruckelshaus, supra.*[1]

Sierra Club v. *Ruckelshaus* determined that Section 101(b)(1) of the Clean Air Act, 42 U.S.C. 1857(b)(1), prohibited the significant deterioration of air quality which is better than the national standards.[2] It essentially adopted the earlier position of EPA that the Act

[1] Petitioners do not contend that the affirmance by an equally divided vote of this Court has value as precedent. *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972). The court of appeals, however, unanimously affirmed the district court's decision and that judgment, having been affirmed by this Court, was binding on the agency.

[2] This petition will not reargue whether the decision in *Sierra Club* v. *Ruckelshaus* was correct. The court below agreed that it was. Petition, No. 76-529, App. A, p. 29a. A number of industry petitioners are challenging this aspect of the decision below and we will respond to those arguments in our brief in opposition to those petitions.

did not permit the "significant deterioration of existing air quality in any portion of any State." 40 C.F.R. 50.2(c). The district court in *Sierra Club* v. *Ruckelshaus* ordered EPA to follow its own regulation, requiring it to disapprove any state implementation plan which would "permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator." Appendix, p. 23.

The regulations adopted by EPA violate this requirement in two important ways. First, they authorize the degradation of clean air to the level of the national standards in any area which is designated as Class III. Second, they fail to prevent, in any way, the degradation of existing air quality by four of the six regulated pollutants.

1. Section 101(b)(1) requires EPA to "protect * * * the quality of the nation's air resources." This language, which is the foundation of the Act's prohibition of significant deterioration, covers the entire country. It does not suggest that a state or other body may choose which areas will have their clean air protected and which not.

Moreover, the legislative history of this section also makes clear that the prohibition against significant deterioration applies to all clean air areas. In testimony to both Houses of Congress in support of the 1970 Clean Air Act, Secretary of HEW Finch stated that the existing 1967 and proposed 1970 Acts prohibited significant deterioration. He then explained what it meant: "We shall continue to expect States to maintain air of good quality where it now exists." Hearings on Air Pollution before the Subcommittee on Air and Water Pollution of the Senate Public Works Committee, 91st Cong., 2d Sess. 132-133 (1970); Hearings on Air Pollution Control

and Solid Waste Recycling before the Subcommittee on Public Health and Welfare of the House Interstate and Foreign Commerce Committee, 91st Cong., 2d Sess. 297 (1970). Under Secretary of HEW Veneman, who presented Secretary Finch's statement, then further explained to the Senate Committee (p. 143):

> We do not intend to condone "backsliding." If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air even further, even though they may be below national standards.

The order of the district court, which simply elaborated on the position which EPA had already taken in its promulgation of 40 C.F.R. 50.2(c), prohibited the Administrator from approving state implementation plans which allowed pollution to rise to the level of the national standards "in any portion of any state." [1]

Nevertheless, EPA adopted regulations which permit degradation of existing clean air, regardless of its present quality, so long as the area has been redesignated as a Class III area. Since there are no restrictions in the regulations limiting the size of a Class III area and none on the type of area which would be appropriate for such designation, large areas presently enjoying pristine air could be so designated, as well as regions where industrial development is already occurring.

The court below did not respond to petitioners' contention that permitting deterioration to the level of the national standards directly contradicted the requirement

[1] There are areas which could technically be called "clean air areas" because the air quality does not violate any of the standards, but where even a small increase in pollutants would reach the level of the standards. The district court's order does not forbid such an increase because only "significant" increases are prohibited, Of course, the level of the standards may not be exceeded, no matter how slight the increase.

of the Clean Air Act and the order of the district court in *Sierra Club* v. *Ruckelshaus*. Instead, the court below avoided discussion of that contention and approved the EPA structure, by merely terming it "a rational policy decision" and a "workable definition of significant deterioration * * *." Petition, No. 76-529, App. A, p. 33a.

The blanket authorization for Class III areas contained in the regulations hardly constitutes a workable definition. On the contrary, there is no definition, merely procedures which must be followed in order to redesignate. If the procedures are observed, any additional deterioration is permitted as long as the national standards are not exceeded. There is, for example, nothing to prevent large areas of this country, including urban areas, with annual average sulfur dioxide levels of less than 15 micrograms per cubic meter, from rising to the level of the national standard of 80 micrograms, as long as such areas are designated as Class III. If the Clean Air Act allows deterioration of clean air to the national standards virtually at will, then prohibition of significant deterioration of air quality is rendered almost meaningless.

2. Section 108 of the Clean Air Act, 42 U.S.C. 1857c-3, provides that the Administrator must adopt standards for "each air pollutant—(A) which in his judgment has an adverse effect on public health or welfare * * *." The Administrator has determined that six air pollutants come within this definition and has adopted national primary and secondary standards for them. 40 C.F.R. 50.4-.11.

Nevertheless, the regulations, which purport to prevent significant deterioration of clean air, include processes relating to only two of the regulated pollutants, sulfur dioxide and particulates. Nitrogen oxides, hydrocarbons, carbon monoxide, and photochemical oxidants are left to-

tally unregulated.[1] This is directly inconsistent with Section 101(b)(1), which requires that the nation's air resources be protected without distinguishing between kinds of pollutants, and the district court's order, which requires the protection of existing air quality which is better than any of the secondary standards.

EPA does not claim that the Act does not apply to significant deterioration of air quality from the other four pollutants. Rather, EPA has, in effect, argued that it would like to control these pollutants but does not know how. More specifically, EPA has chosen a system of pollution increments as its method for carrying out the prevention of significant deterioration. To determine whether the increments have been "used up" when a new major pollution source seeks to locate in a clean air region, EPA uses models. Petition, No. 76-529, App. A, p. 65a. EPA now asserts that it does not know how to model for these four pollutants in clean air regions, and that it therefore cannot control them. *Id.* at 30a. The court below accepted this argument, terming it a policy decision involving the agency's expertise. *Id.* at 31a.

We submit that difficulties in enforcing a federal statute are not an excuse for ignoring it. If EPA believes that the prohibition against significant deterioration of these pollutants is difficult to enforce, it can seek relief from Congress. In the meantime, it has the responsibility to do all that is reasonably possible to carry out the requirements of the statute.

Moreover, the apparent difficulties in the instant case are largely of EPA's own making. EPA selected the system for implementing the policy of preventing sig-

[1] Photochemical oxidants are formed from the interaction of hydrocarbons and nitrogen oxides rather than being directly emitted. Control of the precursor pollutants should be adequate to prevent degradation by oxidants. However, the significant deterioration regulations do not attempt to control either precursor pollutant.

nificant deterioration. It was neither the only possible system nor was it mandated by Congress. Indeed, EPA proposed four methods of implementation in 1973 (38 Fed. Reg. 18986) and described seven methods in the Technical Support Document it prepared in support of the present regulations. One of these methods, a direct limitation on the amount of emissions in a region coming from stationary sources, requires no modelling and could clearly reduce the amount of deterioration caused by these other pollutants. While EPA has decided that the present incremental system is preferable for sulfur dioxide and particulates (39 Fed. Reg. 31000), it has never explained why an emission limitation method or one of the other methods could not be used to implement the Act's prohibition of significant deterioration as to the other four pollutants.

3. The issues raised in this petition are of broad national importance. Most of the country presently enjoys air quality far better than would be permitted by the national standards. For example, many areas, urban as well as rural, presently have air containing amounts of sulfur oxides many times lower than would be permitted by the national standards. EPA, Monitoring and Air Quality Trends Report, 1972. According to the Administrator of EPA, about 80 percent of the country enjoys air which contains less sulfur oxide than the national standards allow and about 50 percent of the country has air quality better than the standards for particulate matter.

These pollutants all have adverse effects on human health and welfare, even at levels below the national standards. While scientific evidence may not yet be sufficient to require lowering of the national standards, there is increasing data showing significant health and other effects caused by pollutants at low levels. There is particular concern over exposure to these pollutants over long periods of time.

For example, a study presented to the National Academy of Sciences, Assembly of Life Sciences, cites as part of its conclusions: [1]

> That SO_2 [sulfur dioxide] and particulates and, even more, their products sulfuric acid and acid sulfates are toxic and may seriously affect the health of significant numbers of humans, even at levels generally considered safe.
>
> * * * *
>
> That a highly variable dose-response relationship exists between SO_2 and particulate levels—and that there is no thresho'd for health effects.

Consequently, the increases of sulfur oxides and particulates from low levels to the national standards will have serious health effects.

Similarly, the pollutants omitted by the regulations have been shown to have serious health effects at levels which are often well below the national standards. For example, an extensive statistical analysis of mortality and morbidity rates in a number of metropolitan areas showed a significant correlation between low levels of nitrogen dioxide and increased rates of cancer and heart disease.[2] The National Academy of Sciences has concluded that "* * * the addition of any CO (carbon monoxide) above background represents an additional stress on persons with heart and artery disease." [3] Photochemi-

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[1] Carnow, "Sulfur Oxides and Particles: Effects on Health," reprinted in Proceedings of the Conference on Health Effects of Air Pollutants, S. Rep. No.15, Senate Committee on Public Works, 93d Cong., 1st Sess. 262, 272 (1973).

[2] Hickey, et al., Ecological Statistical Studies of Environmental Pollution and Chronic Disease in Metropolitan Areas of the United States, Regional Science Research Institute Discussion Paper Series, No. 35, pp. 56, 79, 80 (1970).

[3] NAS, Supplemental Statement Concerning the Report of the Conference on Air Quality and Automobile Emissions, p. 11 (July 29, 1975).

cal oxidant pollution is measured by ozone levels. Ozone has been described as "one of the most acutely toxic gases known * * *," in a study which concluded that there is no threshold level for this substance.[1]

In short, all of the six pollutants regulated by the Clean Air Act are known to cause serious damage to human health and welfare, necessitating the adoption of standards to control them. Scientific information is growing that they also cause substantial harm at levels well below those standards, even though that information may not yet be adequate precisely to quantify the effects so as to change the standards. Thus exposure of large areas of the country to massive increases in these pollutants, through the designation of areas as Class III and through the failure to control certain of these substances, may have a serious, damaging effect on the health of a large number of people.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this petition for a writ of certiorari should be granted.

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November 1, 1976

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[1] Neuberger and Radford, "Review of Human Health Criteria for Ambient Air Quality Standards in Maryland," Department of Environmental Medicine, Johns Hopkins University, pp. 6, 11-12 (1974).

APPENDIX

Civil Action Number 1031-72

[Filed May 30, 1972, James F. Davey, Clerk]

SIERRA CLUB, *et al.*,
Plaintiffs,

v.

RUCKELSHAUS,
Defendant.

PRELIMINARY INJUNCTION

It appearing to the Court that a Preliminary Injunction pending hearing and determination of plaintiffs' request for a permanent injunction and other relief should be issued because, unless defendant is enjoined from approving portions of state implementation plans permitting significant deterioration of air quality, plaintiffs may suffer immediate and irreparable injury, loss and damage before the determination of this case on the merits,

NOW, THEREFORE, IT IS ORDERED, that defendant, his agents, officers, servants, employees, and attorneys, and any persons in active concert or participation with him, be and they are, hereby enjoined until plaintiffs' request for a permanent injunction and other relief has been determined by this Court from, directly or indirectly, approving any state implementation plan under 42 U.S.C. 1857c-5 unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator. The Ad-

ministrator shall complete this review of all the state plans within four months of this order. The Administrator, shall within this four-month period, approve any portion of a state plan which effectively prevents the significant deterioration of existing air quality in any portion of any state, and disapprove any portion of a state plan which fails to effectively prevent the significant deterioration of existing air quality in any portion of any state.

The Administrator shall prepare and publish proposed regulations, pursuant to 42 U.S.C. 1857c-5(c) as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order.

This order shall be stayed until 9:00 a.m., May 31st, 1972.

/s/ J. G. Pratt

DATE 30 May 1972